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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 VANNARA PHOU, ) CASE NO. C09-1367-RAJ  
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Petitioner, )  
10 )  
v. ) REPORT AND RECOMMENDATION  
11 )  
THOMAS R. DECKER, et al., )  
12 )  
Respondent. )  
13 \_\_\_\_\_ )

14 I. INTRODUCTION AND SUMMARY CONCLUSION

15 Petitioner Vannara Phou is being detained by the U.S. Immigration and Customs  
16 Enforcement (“ICE”) pursuant to a final order of removal to Cambodia that was entered on  
17 March 17, 2007. On September 4, 2009, petitioner, proceeding through counsel, filed the  
18 present Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, which challenges the  
19 statutory and constitutional authority of ICE to detain him any further due to the unlikelihood of  
20 his removal from the United States in the reasonably foreseeable future because he is stateless.  
21 (Dkt. No. 1.) Respondents have filed a motion to dismiss, arguing, *inter alia*, that petitioner’s  
22 detention is warranted because ICE has travel documents and is in the process of removing

petitioner to Cambodia. (Dkt. No. 19.)

For the reasons set forth below, the Court recommends that respondents' motion to dismiss be GRANTED.

## II. BACKGROUND AND PROCEDURAL HISTORY

Petitioner was born in 1980 in the Khao I Dang Cambodian refugee camp in Prachinburi Province, Thailand, to parents who were citizens of Cambodia.<sup>1</sup> (AR L4-5, L24, L378, L406, L447, L500.) On February 15, 1984, petitioner was admitted to the United States as a refugee, and on December 25, 1985, he adjusted his status to lawful permanent resident. (AR L5.) On March 27, 2001, petitioner was convicted in the Common Pleas Court of Philadelphia, Pennsylvania of robbery in violation of Title 18 Pennsylvania Consolidated Statutes section 3701, and was sentenced to house arrest with a monitor for three to twelve months. (AR L19-17, L32.)

On June 6, 2003, ICE served petitioner with a Notice to Appear, placing him in removal proceedings and charging him as subject to removal under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA") for having been convicted of an aggravated felony as defined under INA § 101(a)(43)(F), as a crime of violence for which the term of imprisonment ordered is at least one year. (AR L12-14.) However, an Immigration Judge ("IJ") terminated petitioner's immigration proceedings after finding that petitioner's sentence to "house arrest" did not qualify as a "term of imprisonment" under INA § 101(a)(43)(F). (L35-39.)

The Department of Homeland Security ("DHS") appealed the IJ's decision to the Board

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<sup>1</sup> Petitioner's parents became naturalized United States citizens in 2004. (AR R239, R237.)

01 of Immigration Appeals (“BIA”), arguing that on June 30, 2003, petitioner was re-sentenced to  
02 11½ to 23 months incarceration for a parole violation and is “now clearly removable as charged  
03 in the Notice to Appear.” (AR L53-55, L65, L67-69, L93.) On January 29, 2004, the BIA  
04 vacated the IJ’s decision and remanded to the Immigration Court for further proceedings. (AR  
05 L172-74.) On June 25, 2004, however, the IJ once again terminated petitioner’s immigration  
06 proceedings, after petitioner presented a June 15, 2004, order from the criminal court which  
07 vacated its June 30, 2003, re-sentencing based on its finding that petitioner had not violated his  
08 probation. (AR L180-82.) DHS timely appealed the IJ’s decision to the BIA, arguing that  
09 petitioner’s sentence to “house arrest” constituted a “term of imprisonment” under the INA.  
10 (AR L211-20.) The BIA sustained the DHS appeal, reinstated the aggravated felony charge,  
11 and remanded to the Immigration Court to determine the petitioner’s country of removal and to  
12 consider whether the petitioner may be eligible for relief from removal. (AR L237-38.)  
13 Petitioner filed a petition for review of the BIA’s decision with the Third Circuit Court of  
14 Appeals, which dismissed the petition for review for lack of jurisdiction because there was no  
15 final order of removal against the petitioner. (AR R113, R159.)

16 On October 16, 2006, the IJ denied petitioner’s application for withholding of removal  
17 and for protection under the Convention Against Torture (“CAT”), and ordered him removed to  
18 Cambodia. (AR L368-78.) Petitioner asserted that he was stateless and declined to designate  
19 a country of removal, the government designated Cambodia. (AR 444.) On November 9,  
20 2006, petitioner appealed the IJ’s removal order to the BIA, arguing, *inter alia*, that he was  
21 stateless and therefore could not be removed to Cambodia without any evidence as to his  
22 citizenship. (AR L360-62, L475-91.) On January 30, 2007, the BIA remanded proceedings

01 back to the IJ to determine the question of petitioner's citizenship, to provide petitioner an  
02 opportunity to apply for relief from removal to Thailand, and to provide additional evidence for  
03 relief from removal to Cambodia. (AR L499-502.) Specifically, with regards to petitioner's  
04 citizenship, the BIA held,

05 In the present matter, the record evidences that the [petitioner] was born in a  
06 refugee camp in Thailand. Consequently, we find the Immigration Judge's  
07 factual determination that the [petitioner] is a native of Cambodia to have been  
08 clearly erroneous. See I.J. at 1. See generally 8 C.F.R. § 1003.1(d)(3)(i). It is  
09 also notable that the [petitioner] contests the DHS's assertion that he is a citizen  
10 of Cambodia. Although it is clear from the record that the [petitioner's] parents  
11 were both Cambodian citizens at the time of his birth, the record is devoid of any  
12 evidence regarding that nation's citizenship laws. Accordingly, we find it  
13 appropriate to remand the matter for further fact-finding on the question of the  
14 [petitioner's] citizenship, in addition to the proper country of removal.

11 (AR L500.)

12 On March 17, 2007, the IJ held another hearing and ordered petitioner removed from the  
13 United States to Cambodia. (AR L503.) Petitioner waived appeal of the IJ's decision. *Id.*  
14 On or about March 22, 2007, ICE forwarded a "travel presentation" to the Consulate of  
15 Cambodia. (AR R183, R257.) However, respondents were unable to effectuate petitioner's  
16 removal to Cambodia, and petitioner was released under an Order of Supervision on August 31,  
17 2007. (AR R271, R334.)

18 On July 14, 2009, ICE received notification that Cambodian officials had issued a travel  
19 document for petitioner's removal to Cambodia. (AR R331, R338.) On September 2, 2009,  
20 ICE issued a Notice of Revocation of Release, informing petitioner that he would be placed in  
21 custody for removal to Cambodia. (AR R338.) Petitioner was taken into ICE custody in  
22 Philadelphia, Pennsylvania, on September 4, 2009. (AR R350.) The same day, petitioner,

01 through counsel, filed the present petition for writ of habeas corpus in the United States District  
02 Court for the Eastern District of Pennsylvania. (Dkt. No. 1.) Petitioner was subsequently  
03 transferred to the Northwest Detention Center in Tacoma, Washington, and this matter was  
04 transferred to the Western District of Washington. (Dkt. No. 8.)

### 05 III. DISCUSSION

06 Section 241(a)(1)(A) of the INA states that “[e]xcept as otherwise provided in this  
07 section, when an alien is ordered removed, the Attorney General shall remove the alien from the  
08 United States within a period of 90 days (in this section referred to as the ‘removal period’).”  
09 INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). During the removal period, continued  
10 detention is required. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (“During the removal period, the  
11 Attorney General shall detain the alien.”). Under Section 241(a)(6), the Attorney General may  
12 detain an alien beyond the 90-day removal period. INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

13 In *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), the  
14 Supreme Court considered whether the post-removal-period statute, INA § 241(a)(6),  
15 authorizes the government “to detain a removable alien *indefinitely* beyond the removal period  
16 or only for a period *reasonably necessary* to secure the alien’s removal.” *Zadvydas*, 533 U.S.  
17 at 682. The petitioners in *Zadvydas* could not be removed because no country would accept  
18 them. Thus, removal was “no longer practically attainable,” and the period of detention at  
19 issue was “indefinite” and “potentially permanent.” *Id.* at 691. The Supreme Court held that  
20 INA § 241(a)(6), which permits detention of removable aliens beyond the 90-day removal  
21 period, does not permit “indefinite detention.” *Id.* at 689-697. The Court explained that  
22 “once removal is no longer reasonably foreseeable, continued detention is no longer authorized

01 by statute.” *Id.* at 699.

02       The Supreme Court further held that detention remains presumptively valid for a period  
03 of six months. *Id.* at 701. After this six-month period, an alien is eligible for conditional  
04 release upon demonstrating “good reason to believe that there is no significant likelihood of  
05 removal in the reasonably foreseeable future.” *Id.* The burden then shifts to the Government  
06 to respond with sufficient evidence to rebut that showing. *Id.* The six-month presumption  
07 “does not mean that every alien not removed must be released after six months. To the  
08 contrary, an alien may be held in confinement until it has been determined that there is no  
09 significant likelihood of removal in the reasonably foreseeable future.” *Id.*

10       In this case, petitioner waived appeal of the IJ’s March 17, 2007, order of removal.  
11 Accordingly, petitioner’s order of removal became administratively final on that day. 8 C.F.R.  
12 § 1241.1(b); INA § 101(47)(B)(ii), 8 U.S.C. § 1101(47)(B)(ii). Petitioner’s removal period  
13 thus began on March 17, 2007, the date his removal order became administratively final. INA  
14 § 241(a)(1)(B)(i), 8 U.S.C. § 1231(a)(1)(B)(i)(“The removal period begins . . . [t]he date the  
15 order of removal becomes administratively final”).<sup>2</sup> Thus, the presumptive six-month period  
16 in *Zadvydas* expired on or about September 17, 2007.<sup>3</sup>

17       Consequently, petitioner’s detention is no longer presumptively reasonable. The Court  
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19       2 INA § 241(a)(1)(B)(ii) is inapplicable because petitioner’s habeas petition and stay of  
20 removal do not “entail judicial review of a *removal order*, as the plain text of the statute  
21 requires.” *See Diouf v. Mukasey*, 542 F.3d 1222, 1230 (9<sup>th</sup> Cir. 2008).

22       3 As indicated *supra*, respondents were initially unable to effectuate petitioner’s  
removal to Cambodia, and petitioner was released under an Order of Supervision on August 31,  
2007. (AR R271, R334.) However, respondents subsequently secured a travel document for  
petitioner’s removal and petitioner was taken back into ICE custody on September 4, 2009, for  
removal to Cambodia. (AR R350.)

01 must, therefore, determine whether petitioner has shown that “there is no significant likelihood  
02 of removal in the reasonably foreseeable future,” and if so, whether the Government has  
03 responded with “evidence sufficient to rebut that showing.” *Zadvydas*, 533 U.S. at 701. The  
04 Court finds that petitioner has failed to satisfy his burden of showing that there is no significant  
05 likelihood of removal in the reasonably foreseeable future.

06 Contrary to petitioner’s argument, the expiration of the presumptive six-month period  
07 does not, in and of itself, justify release. The government has obtained travel documents for  
08 petitioner’s removal, and was in the process of removing petitioner to Cambodia. Petitioner  
09 remains in detention only because he sought and received a stay of removal from this Court.  
10 Petitioner may not simultaneously maintain that he is entitled to release because his removal is  
11 not reasonably foreseeable and that he is entitled to a stay of removal because his removal is  
12 imminent. Accordingly, the Court finds that petitioner’s removal will occur in the reasonably  
13 foreseeable future, and his detention is not indefinite.

14 Petitioner asserts that he is a stateless individual who cannot be removed to Cambodia  
15 because he has no affiliation with that country. He concedes that he was ordered removed to  
16 Cambodia, but contends that the government’s designation of Cambodia was improper and that  
17 the Immigration Court’s “Order did not address the citizenship of the Petitioner.” (Dkt. No. 21  
18 at 4, 6.) Petitioner requests that the Court order “that he be released from US Government  
19 custody and that the US Government be ordered not to detain Mr. Phou again.” (Dkt. No. 21 at  
20 9.) Respondents argue that such relief is not proper because the REAL ID Act of 2005, Pub. L.  
21 No. 109-13, 119 Stat. 231 (May 11, 2005), divests the Court of jurisdiction to grant relief from  
22 removal. The Court agrees with respondents. It is clear from reviewing the habeas petition

01 and petitioner's response to respondents' motion to dismiss that petitioner is challenging the  
02 IJ's designation of Cambodia as the country of removal, which is beyond this Court's  
03 jurisdiction.

04 "After determining that a noncitizen is removable, an IJ must assign a country of  
05 removal." *Hadera v. Gonzales*, 494 F.3d 1154, 1156 (9<sup>th</sup> Cir. 2007). Section 241(b)(2) of the  
06 INA sets out a four-stage process for determining the appropriate country of removal. 8  
07 U.S.C. § 1231(b)(2). In *Jama v. ICE*, 543 U.S. 335, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005),  
08 the Supreme Court organized this statutory framework into the following removal commands:

09 (1) An alien shall be removed to the country of his choice, unless one of the  
10 conditions eliminating that command is satisfied; (2) otherwise he shall be  
11 removed to the country of which he is a citizen, unless one of the conditions  
12 eliminating that command is satisfied; (3) otherwise he shall be removed to one  
of the countries with which he has a lesser connection; or (4) if that is  
"impractical, inadvisable or impossible," he shall be removed to "another  
country whose government will accept the alien into that country."

13 *Id.* at 341 (internal citations omitted).

14 In the present case, the BIA remanded to the Immigration Court "for further fact-finding  
15 on the question of the [petitioner's] citizenship, in addition to the proper country of removal"  
16 pursuant to INA § 241(b). (AR L500.) On remand, the IJ ordered petitioner removed to  
17 Cambodia, and petitioner waived appeal of that decision. Petitioner now contests the validity  
18 of his removal order to Cambodia. However, as set for below, the REAL ID Act made  
19 petitions for review in the courts of appeals the "sole and exclusive means for judicial review"  
20 of an order of removal. INA § 242(a)(5), 8 U.S.C. § 1252(a)(5).

21 The REAL ID Act amended the Immigration and Nationality Act by eliminating federal  
22 habeas corpus review of final orders of removal. *See* REAL ID Act, Pub. L. No. 109-13, 119

Stat. 231. Title 8 U.S.C. § 1252, as amended by the REAL ID Act, provides the exclusive means of reviewing a final order of removal. That section provides,

Notwithstanding any other provision of law (statutory or nonstatutory) including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms “judicial review” and “jurisdiction to review” include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

INA § 242(a)(5). The statute further states that the “petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed proceedings.”

INA § 242(b)(2). These provisions makes clear that the court is precluded from exercising jurisdiction over any claim by petition which necessitates review of an order of removal.

Petitioner urges the Court to retain jurisdiction, arguing that he “is not challenging the removal order at all. Instead, Petitioner is challenging his illegal detention.” (Dkt. No. 21 at 6.)

Although petitioner frames his habeas petition only as a challenge to his detention, his contention that he cannot be removed to Cambodia because he is stateless is a direct challenge to the IJ's determination that Cambodia is the appropriate country of removal. Accordingly, petitioner's habeas challenge to his final order of removal may not be considered.

### III. CONCLUSION

For the foregoing reasons, the Court recommends that respondents' motion to dismiss and vacate stay of removal be GRANTED, and that this matter be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

01 DATED this 7th day of January, 2010.

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04 Mary Alice Theiler  
05 United States Magistrate Judge  
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